IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 29/04/2003

CORAM

THE HON'BLE MR.JUSTICE V.KANAGARAJ

SECOND APPEAL NO. 1080 of 1998 and SECOND APPEAL NO. 1081 of 1998

1.Samba Sivam.
2.Minor Suguna.
3.Minor Kalai Arasi.
4.Minor Thilagam.

(Minor appellants 2 to 4
are duly represented by
their natural guardian/next
friend and father-the 1st
appellant herein). ...Appellants.
In A.S.1080 of 1998.

-Vs-

Mr.Gunasekaran. ...Respondent
in A.S.1080 of 1998

Sambasivam. ...Appellant in
A.S.No.1081 of 1998

-Vs-

1.Venkataraman.

2.Gunasekaran. ...Respondents.
In A.S.No.1081 of 1998.

Second Appeals preferred under Section 100 C.P.C., praying for
the reliefs as stated therein.

!For Appellants in ..... Mr.R.Asokan.
both the Second Appeals.

^For Respondents ..... Mr.T.R.Rajaraman.
in both the Second Appeals.

:J U D G M E N T

Second Appeal No.1080 of 1998 is preferred against the judgment and decree dated 31.7.1996 rendered in A.S.No.27 of 1994 by the Court of Subordinate Judge, Dharmapuri, thereby dismissing the Appeal without costs and confirming the judgment and decree dated 29.10.1993 rendered in O.S.No.353 of 1989 by the Court of District Munsif, Harur.

2. Tracing the history of the above Second Appeal coming to be preferred by the defendants in the suit, it comes to be known that the respondent/plaintiff has filed the suit for declaration and injunction, on averments such as that the suit property belongs to the plaintiff by way of the sale deed dated 23.8.1989 and the said property was purchased from one Venkataraman, who got the power deed from the 1st defendant; that ever since, the plaintiff, being in possession, is cultivating the same; that the defendants have no right in the same, but the 1st defendant asked the plaintiff to quit the suit property since he has to cancel the power deed;

that since the plaintiff refused, the 1st defendant and his men attempted to enter into the suit property forcibly. Hence the suit for declaration and injunction.

3. On the contrary, the defendants in their written statement would state that it is false to say that the suit property belongs to the plaintiff; that he is not a bonafide purchaser for value; that possession was not given to the plaintiff; that the suit property is the ancestral property allotted to the 1st defendant by way of partition; that the 1st defendant executed a general power deed in favour of one Venkataraman, who is his brother and father-in-law of the plaintiff; that since Venkataraman has not handed over the accounts, the 1st defendant sent a notice on 24.8.1989 to him stating that he would cancel the power deed from 7.9.1989; that with a view to misuse his power and to cheat the 1st defendant, Venkataraman prepared a sale deed showing that the suit property is sold in favour of the plaintiff for a sum of Rs.48,000/- and that sale deed is not yet completed by the Registration Department; that in the meantime the power deed was cancelled, that the 1st defendant is in possession of the suit property, that since the plaintiff and Venkataraman attempted to interfere with the possession and enjoyment of the suit property, the 1st defendant filed a suit in O.S.No.115 of 1990 and obtained an injunction and it is still in force; that since the sale deed is a forged one, the plaintiff has no right; that there is no cause of action; that since Venkataraman has sold his own property, viz., S.No.12/6c measuring 1872 sq.feet for Rs.7,000/- ,it is clear that it is not true that the suit property was sold only for Rs.48,000/-. On such averments, the defendants would pray to dismiss the suit with costs.

4. On such pleadings by parties, the trial court would frame the following issues for determination of the questions involved in the suit, viz., (i) Whether the plaintiff has no right in the suit property? (ii) Whether the plaintiff is entitled to the relief of declaration of title? (iii) Whether the suit property is not in possession of the plaintiff? (iv) Whether the plaintiff is entitled to injunction? And (v) What relief, if any, is the plaintiff entitled to?

5. Second Appeal No.1081 of 1998 is preferred against the judgment and decree dated 29.10.1993 rendered in A.S.No.34 of 1994 by the court of Subordinate Judge, Dharmapuri thereby dismissing the appeal without costs and confirming the judgment and decree dated 29.10.1993 rendered in O.S.No.115 of 1990 by the Court of District Munsif, Harur.

6. Tracing the history of the above Second Appeal coming to be preferred by the plaintiff in the suit, it comes to be known that the appellant herein as the plaintiff has filed the suit for permanent injunction, on averments such as that the suit property was the ancestral one and it was allotted to the plaintiff by way of oral partition and it is in his possession; that the defendants have no right or possession in the same; that the 1st defendant is the elder brother of the plaintiff; that the 2nd defendant is the brother-in-law of the 1st defendant; that the 1st defendant has no title to the suit property as he has got partition of separate property; that since the plaintiff had some heart problem, he executed the general power deed in favour of the 1st defendant on 27.10.1988, but it is the plaintiff, who is managing the suit property from the first week of April 1989 due to disputes with the first defendant regarding the accounts; that he sent notice to the 1st defendant before and after the cancellation of the power deed; that on hearing the cancellation of the power deed by the plaintiff, the 1st defendant executed a sale deed on 23.8.1989 in favour of the second defendant, but no possession was given and the possession is only with the plaintiff; that the sale was neither informed to him, nor his permission was obtained and the sale consideration was also not returned; that the plaintiff has not accepted the sale deed, since no right was given to the 2nd defendant by that sale deed; that the 1st defendant has not only prepared the forged sale deed joining hands with the 2nd defendant, but also instigated the 2nd defendant to file the suit in O.S.No.353/89 for declaration and injunction; that the first defendant is not entitled to any temporary injunction in that suit; that since there was an attempt to evict the plaintiff away from the suit property, the present suit is filed; that since the sale deed dated 23.8.1989 was not executed by the plaintiff, it is not valid; that when the plaintiff attempted to cultivate the suit property on 21.2.1990, the defendants and their men interfered with the possession and enjoyment of the plaintiff and also prevented him, and hence the suit for the relief of permanent injunction.

7. On the contrary, the 2nd defendant in his written statement would deny the execution of the power deed by the plaintiff due to his health condition, that it is not true that on knowing about the attempt to cancel the power deed, the 1st defendant executed the sale deed in favour of the 2nd defendant and that the possession was not handed over to him; that the plaintiff cannot ignore the sale deed in favour of the 2nd defendant, but he has to pray for the relief of cancellation of the sale deed; that it is not true that the defendants attempted to enter into the suit property forcibly, as there is no necessity for the same; that the 1st defendant had taken possession through power deed and sold the same to the 2nd defendant and the 2nd defendant is in possession of the same; that the 2nd defendant has put up cement pipe, oil engine and a well by incurring an expense of Rs.1,00,0 00/-; that the said pipe line is passing through the land of the 1st defendant; that

as the 2nd defendant obtained sale on the basis of the power deed executed by the plaintiff in favour of the 1st defendant, the plaintiff has no right to say that the sale deed is not valid; that as the 2nd defendant has already filed a suit O.S.No.353/89 with regard to the suit property, the plaintiff has no right to file a fresh suit without contesting the suit O.S.No.353/89. On such averments, the 2nd defendant would pray to dismiss the suit.

8. On such pleading by parties, the lower court having framed the following issues for determination of the questions involved in the suit, viz., (i) Whether the suit property is not with the possession of the plaintiff? (ii) Whether the suit is not maintainable? (iii) Whether the plaintiff is entitled to injunction? and (iv) What relief, if any, is the plaintiff entitled to?

9. Since the subject matter of the suit and parties are one and the same, a joint trial was held and common evidence was recorded in O. S.No.353 of 1989. The plaintiff/purchaser on his side would examine himself as P.W.1 and would also examine three other witnesses as P.Ws. 2 to 4 and would mark seven documents as Exs.A.1 to A.7 in support of his case for documentary evidence. On the part of the defendants, in all three witnesses are examined as D.Ws.1 to 3 for oral evidence and would mark 18 documents as Exs.B.1 to B.18 in support of their case for documentary evidence. Commissioner's report and plan are marked as court documents as Exs.C1 and C2.

10. Learned District Munsif, Arur, having traced the facts and circumstances of the case as pleaded by parties, further having framed the issues brought forth above and having appreciated the same in evidence, issue-wise, had decreed the suit O.S.353 of 1993 as prayed for without costs, giving liberty to the defendants to file a suit, praying for market rate with regard to the suit property or for accounts. The learned District Munsif also dismissed the suit in O.S.115/90 without costs. Aggrieved by the said common judgment, the defendants in O.S.No.353/89 has preferred an appeal in A.S.No.27/94 and the plaintiff in O.S.No.115/90 has preferred an appeal in A.S.No.34/94 before the Court of Subordinate Judge, Dharmapuri and the said court also tracing the facts as pleaded before the trial court and framing the following points, viz., (i) Whether the sale of the suit property effected on the basis of the general power deed dated 27.10.1988 is a legal one? (ii) Whether the appellant is in possession of the suit property on the date of suit? (iii) Whether the appellant is entitled to the relief of permanent injunction without asking the prayer for declaration in O.S.No.115/90? (iv) To what relief?, and appreciating the oral and documentary evidence placed on record, would find that the appellant/original owner in both the appeals is not entitled to the relief prayed for in the appeals and dismissed both the appeals without costs, confirming the common judgment and decree of the trial court.

11. It is only against the common judgment delivered by the first appellate court, the original owner of the property has come forward to prefer both the above second appeals on certain grounds as brought forth in the grounds of Second Appeals.

12. At the time of admission, notice of motion was ordered and therefore, no substantial questions of law have been framed in both the above second appeals, and now it has become incumbent on the part of this Court to frame the substantial questions of law for determination of the above second appeals prior to hearing the parties and the same are as follows:-

a. Whether the courts below committed material irregularity in decreeing the suit filed by the plaintiff/respondent herein, in view of the categorical evidence of P.W.2 on record that Ex.A.2 (viz.) the Power of Attorney Deed is only a deed of exchange and not for any other purpose?
b. Are not the courts below committed an error apparent on the face of the record by decreeing the suit filed by the plaintiff/ respondent herein for declaration and permanent injunction as evidence of P. W.2 is contrary to the finding?

13. During arguments, learned counsel appearing on behalf of the appellant, besides tracing the facts and circumstances of the case as pleaded on the part of the appellant before the courts below, would point out that during the first week of April 1989, the appellant started proclaiming in the village that he was going to cancel the power of attorney given in favour of the first respondent in S.A.No.1081 of 1998, who is none other than the appellant's own brother and knowing full well that the appellant was making all preparations to cancel the power of attorney on 24.08.1989, hastily, the first respondent created the sale deed in favour of the second respondent, who is none other than his brother-in-law, one day before i.e. on 23.8.1989, without knowing which, the appellant cancelled the power of attorney given in favour of his brother Venkataraman on 24.8.1989 as scheduled and the suit had been filed by the purchaser on 29.9.1989 on false allegations that he is in possession of the property and that he got possession from the power of attorney agent and not in his individual capacity. Learned counsel would point out that both the courts below have concurrently erred in arriving at the erroneous conclusions without analysing this point. Learned counsel would point out that the power of attorney agent, if at all, was in possession of the property, it was only in his capacity as the agent of the original owner, but not in his individual capacity. Learned counsel would ultimately pray to allow the above appeals setting aside the judgments of the courts below.

14. On the contrary, learned counsel appearing on behalf of the respondents would point out that it is a concurrent judgment rendered in their favour; that both the courts have considered the sale deed and that as against the real owner, a suit for injunction cannot be maintained; that the cancellation of the power of attorney, after the sale deed was over, is not binding; that Ex.A.6 is the clinching document, which would establish that the plaintiff/purchaser is in possession and enjoyment of the property on ground. On such arguments, learned counsel would pray to dismiss both the above second appeals.

15. Barring these, no other arguments, particularly on any legal point has been advanced on either side and hence this Court is inclined to decide the above second appeals on materials made available on record and upon the said arguments of the learned counsel for both so as to determine the

substantial questions of law framed above.

16. For the sake of convenience, O.S.Nos.353/1989 and 115/1990 are hereinafter referred to as the 'first suit' and 'second suit' respectively.

17. In consideration of the facts pleaded, having regard to the materials placed on record and upon hearing the learned counsel for both, what comes to be known is that the plaintiff in the suit in O.S. No.353 of 1989 viz., Gunasekaran is the purchaser of the suit property from the power of attorney agent, viz., Venkataraman, who is none other than the elder brother of the main contender of the suit, the first defendant viz., Sambasivam. It is this Sambasivam, the first defendant, who has filed the other suit in O.S.No.115 of 1990 for permanent injunction alone and in the joint trial held, recording the evidence in the first suit, ultimately, the trial court has held decreeing the first suit and dismissing the second suit, as a result of which, the defendants in the first suit and the plaintiff in the second suit, (the original owner) have preferred the first appeals in A.S.Nos.27 and 34 of 1994 and since both the above said appeals were dismissed by the first appellate court, left with no alternative, the appellants therein have come forward to prefer the above second appeals on certain grounds as brought forth in the grounds of appeals, further praying to determine both the substantial questions of law which have been extracted supra and framed as the substantial questions of law for decision in both the above second appeals.

18. A short tracing of the facts, since being necessary for discussion, are that Gunasekaran, the purchaser of the suit property under Ex.A.1 sale deed dated 23.08.1989 is not the purchaser from the owner of the property, viz., the first defendant therein and the plaintiff in the other suit, but from his power of attorney agent, viz., Venkataraman, who is admittedly the owner's elder brother, who is alleged to have been given the power of attorney dated 27.10.1988 marked as Ex.A.2 in the suit. The next important document is Ex.B.7 dated 24.08 .1989 which is the cancellation notice issued through the lawyer thereby cancelling Ex.A.2 power of attorney issued in favour of the said Venkataraman on 27.10.1988.

19. It is further relevant to consider that the said Venkataraman, the elder brother of the first defendant and his power of attorney agent, has executed the sale deed in favour of the plaintiff in the first suit on 23.08.1989 and the cancellation notice thereby cancelling Ex.A.2 power of attorney has been issued the very next day under Ex.B.7 dated 24.8.1989 by the original owner.

20. Needless to mention that no regular deed or other authenticated record need be necessary nor be registered for cancellation of the power of attorney and a mere notice of information to the power of attorney agent regarding cancellation is sufficient, and therefore, regarding the genuineness of Ex.B.7 cancellation notice dated 24.8.1989, there is absolutely no ambiguity or doubt entertained and since being a general power of attorney given in favour of Venkataraman under Ex.A.2, the owner of the property, who appointed the agent under the power, is at liberty to cancel the

same at any moment. It should never be forgotten that the agent is acting only for and on behalf of the owner of the property and for his convenience and benefits and with no vested interests entrusted with the agent and as against the interest of the owner, the power of attorney agent cannot act. It is always relevant to seek from the agent whether he has acted in the manner expected by law or the purpose that is sought to be achieved by giving such power of attorney has been really achieved and these two aspects need paramount consideration in the cases in hand while discussing and deciding the facts of the case.

21. On the part of the appellant/original owner, he would come forward to allege that in the year 1988, because he fell ill and had to be hospitalized, for managing the affairs of the suit property and for effective cultivation and to do such developmental things that are necessary, he had to appoint his elder brother as his power of attorney agent and if at all any development is done, being in possession of the property, it should be only for and on behalf of the owner of the property, and definitely the power agent cannot act against the interest of the original owner particularly when it is not the case of the original owner or the power agent that for any other purposes, the power agent was acting, much less to sell the land in favour of the plaintiff under Ex.A.1.

22. It further comes to be seen that the owner, who has given the power of attorney has not been benefited even to the extent of a pie from out of the said sale, and therefore, no doubt need be entertained that the power of attorney agent has acted against the interest of the owner and not in safeguarding the owner's interest. The legal necessity, the compelling circumstance and the terms and conditions under which the power agent acted in creating Ex.A.1 sale deed in favour of the purchaser are quite essential to be proved, which are all absolutely lacking in the case particularly when the original owner has come forward to allege that it was a nominal sale created by the power of attorney agent in favour of his own brother-in-law, the plaintiff in the first suit and that too without any consideration being passed on to the owner of the property, and therefore, the transaction held under Ex.A.1 by the power of attorney agent in favour of the plaintiff in the first suit cannot be treated as either genuine or away from blames or has been done within the expectations and parameters of law.

23. The surrounding circumstances under which Ex.A.1 has come into existence is sufficient to prove the totality of circumstances, and therefore, Ex.A.1 cannot at all be treated to have come into being to the legal expectations, and therefore, just for the simple reason that technically, the power of attorney was in favour of the said Venkatraman, it does not mean that he could do anything much less acting quite against the agreed norms and the letter and spirit of law. Absolutely no valid or tangible reason has been assigned either on the part of the purchaser or by the said Venkataraman, the power of attorney agent, to have created the sale deed in favour of the plaintiff in the first suit, particularly when it is vehemently opposed by the owner of the property for whose benefits and to make things easy for him, the very purpose of executing the power of attorney has been done, and therefore, this court is of the view that it is a open case in

which it is not even relevant as to who is in possession or enjoyment of the suit property, on the date of the execution of the sale deed and this question should have been considered uppermost for answer by the lower courts which they have miserably failed.

24. Further, from the very evidence of the plaintiff's witnesses, P.Ws.2 to 4, it has been very clearly and tellingly spoken about by them that only for the purpose of exchange of properties, the power of attorney has been executed by the original owner in favour of Venkataraman, his brother, but it is the sale that has been taken place under Ex.A.1 sale deed in favour of a third party, who is the plaintiff in the first suit, and therefore, whether it is the exchange or the sale, which is meant by the power of attorney, the courts below cannot be said to have arrived at the correct conclusions in giving the decision in favour of the purchaser justifying the manner in which the power of attorney has acted particularly doing everything against the owner, which cannot, under any circumstance, be held to be correct, since the underlying factor of giving the power of attorney is only to make things easy and beneficial and to avoid hardship to the owner, but in the cases in hand, it is quite contrary since the said Venkataraman, the power of attorney, has acted against the interest of the owner and has sold the property without his approval, and therefore, the transaction held under Ex.A.1 cannot be genuine.

25. At the same time, since the defendant in the first suit and the plaintiff in the second suit has not come up to plead and pray for declaring Ex.A.1 to be null and void or unenforceable instrument, this Court is not able to give that relief in his favour and at this juncture, this Court could only set aside the decisions of both the courts below allowing both the above appeals.

In result,

(i) both the above second appeals succeed and they are allowed;

(ii) the judgment and decree dated 31.7.1996 respectively made in A.S.Nos.27 and 34 of 1994 by the Court of Subordinate Judge, Dharmapuri, thereby dismissing the appeals and confirming the common judgment and decree dated 29.10.1993 made in O.S.Nos.353 of 1989 and 115 of 1 990 by the Court of District Munsif, Harur, is hereby set aside.

(iii) the suit in O.S.No.115 of 1990 filed by the original owner is hereby decreed and the suit in O.S.No.353 of 1989 filed by the purchaser is hereby dismissed.

(iv) however, in the circumstances of the case, there shall be no order as to costs.

Index: Yes.
Internet: Yes.

nyr/gs.